

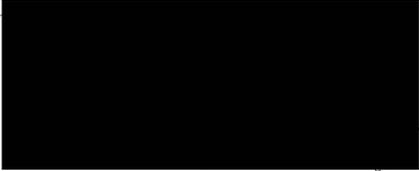
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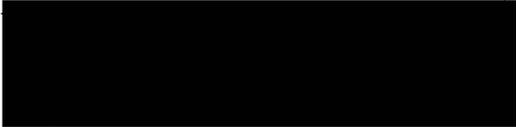
Office: CALIFORNIA SERVICE CENTER Date: JUL 27 2006

WAC-03-002-53237

In re:

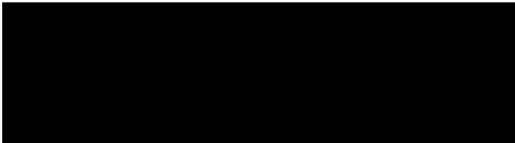
Petitioner:

Beneficiary:



Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a staffing services company and seeks to employ the beneficiary permanently in the United States as an industrial truck operator ("Forklift Driver"). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's November 30, 2004, denial, the case was denied based on the petitioner's failure to demonstrate that the beneficiary met the qualifications required in the labor certification.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹.

The record shows that the appeal is properly filed, timely² and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

In evaluating the beneficiary's qualifications, the U.S. Citizenship & Immigration Service (CIS) must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d).

To document a beneficiary's qualifications, the petitioner must provide evidence in accordance with 8 C.F.R. § 204.5(l)(3):

(ii) *Other documentation—*

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² Counsel sent the appeal by U.S. Postal Service certified mail, which is dated December 29, 2004, and the AAO received on January 6, 2005. We note that the appeal should have been received by January 3, 2005.

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on March 8, 1999. The proffered wage as stated on Form ETA 750 for the position of an industrial truck driver is \$13.05 per hour, 40 hours per week, which is equivalent to \$27,144 per year. On the Form ETA 750A, the "job offer" states that the position requires two years of experience in the job offered, as a Forklift Driver, with job duties partially including: "Drives gasoline, liquefied gas, or electric-powered industrial truck equipped with lifting devices, such as forklift, to push, pull, lift, stack, tier, or move products, equipment, or materials in warehouse, storage yard, or factory . . . may inventory materials on work floor . . . may weigh materials or products . . . may load or unload materials." The petitioner listed that the position required no education in Section 14, and listed no other special requirements for the position in Section 15.

On the Form ETA 750B, signed by the beneficiary on March 3, 1999, the form listed only his position with Staffing Services from March 1999 to "present." The California Employment Development Office accepted an amendment to the ETA 750B experience section, provided in response to an assessment notice. The amendment listed that the beneficiary had two prior relevant positions: (1) that he worked as a Forklift Driver for Preferred Personnel of California from June 1990 to February 1999; and (2) that he worked for Televisa S.A. de C.V. as a Forklift Driver from January 15, 1983 to December 23, 1989.³

The certified ETA 750 was approved on July 29, 2002, and the petitioner filed an I-140 Petition on his behalf on September 27, 2002. The following information was left blank on the I-140 Petition: date established; gross annual income; net annual income; current number of employees; and wages per week.⁴ The Service Center issued a Request for Evidence (RFE) on August 3, 2004 requesting that the petitioner submit evidence by October 26, 2004, of the petitioner's ability to pay from 1999 to 2003; information related to the business, particularly for the address listed on the form I-140, including leases for all years occupied, telephone bills, rent receipts, as well as all city, county, and state business licenses; and that the petitioner submit evidence that the beneficiary had the prior two years of work experience. The RFE also requested that the petitioner submit documentation in the form of W-2's and/or paystubs to corroborate the beneficiary's prior work experience.

³ On the beneficiary's Form G-325 filed with his I-485 Adjustment of Status application, the beneficiary lists that he was employed with Staffing Services from 06/90 to present, and with Preferred Personnel from 06/1990 to 02/1999. No information was listed in the space "show below last occupation abroad if not shown above." The beneficiary did not list the position with [REDACTED]. The dates of experience listed on the G-325 conflict related to Staffing Services conflict with the ETA 750 Forms. It is unclear from the record whether this is an error, or whether the beneficiary's experience overlaps, or whether Preferred Personnel became Staffing Services.

⁴ The tax returns submitted on behalf of the petitioner list that the company was established in March 1995.

In response to the RFE, the petitioner submitted tax returns for the years 1999 to 2003. The petitioner did not submit any of the other requested information.⁵ On November 30, 2004, the director denied the petition for failure to document that the beneficiary had the experience to meet the position requirements as set forth in the certified ETA 750.

The petitioner appealed and submitted a brief explanation with the Form I-290B. Counsel asserted that he had submitted a letter from the beneficiary's prior employer with the RFE response (the file contains no prior submission of such letter). Along with the appeal form, counsel did submit an original letter to document the beneficiary's experience, along with a certified translation. The letter provides that the beneficiary worked as a forklift operator for an employer in Mexico, [REDACTED] for a time period of almost seven years (the letter does not provide the number of hours worked, and whether the position was full or part-time). The letter is dated December 23, 1989, the final day of the beneficiary's listed employment with [REDACTED]. The dates of employment listed on the letter correspond with the experience dates listed on the ETA experience amendment. The translation is dated October 19, 2004, prior to the RFE due date. Why the letter was not submitted initially with the I-140 Petition is not clear. Despite the assertion that the letter was submitted previously, the RFE response contained in the record only included tax returns.

The RFE that the Service Center sent to the petitioner requested documentation to corroborate the beneficiary's work experience, including a request to submit the beneficiary's W-2 forms, and/or paystubs to corroborate his prior experience. No information related to the beneficiary's experience, corroborating or otherwise, was sent in response to the RFE. No corroborating information was forwarded with the single letter forwarded on appeal. The beneficiary lists that he was employed in the U.S. since 1990. Counsel has provided no W-2 statements, or explanation that such statements are unavailable. Counsel has provided no explanation of why a letter dated 1989 was previously unavailable. The AAO sent a fax to counsel on May 11, 2006 inquiring whether he intended to submit additional information, and giving counsel five days to respond. No additional evidence was submitted.

The purpose of an RFE is to obtain further information to clarify whether the beneficiary is eligible for the benefit sought. Eligibility must be established as of the time that the petition was filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). A petitioner's failure to submit requested evidence, which would preclude a material line of inquiry, serves as a ground to deny a petition. 8 C.F.R. § 103.2(b)(14). Where a petitioner has been put on notice of a deficiency in the evidence, and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered to establish eligibility, the petitioner should have submitted the documents in response to the director's RFE. *Id.* Under the circumstances, the AAO need not, and does not, consider the evidence submitted on appeal sufficient.

The experience letter, dated almost seventeen years ago, has now just been produced only after the case was denied. Further, the foreign experience in question was not listed on the Form G-325A. Based on the inconsistencies and omissions in the prior filed documents, it is difficult to determine the source of these omissions and inconsistencies. Unfortunately, this leaves the veracity of the beneficiary's prior work experience in doubt. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), which states: "Doubt raised on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." Further, "It is incumbent on the petitioner to

⁵ The response to the RFE was received on October 27, 2004, a day beyond the due date.

resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies will not suffice.” *Matter of Ho*, 19 I&N Dec. at 591-592.

Absent conclusive corroborating evidence, we find that the record does not demonstrate that the beneficiary meets the position’s experience requirements certified on the Form ETA 750.

This decision is rendered without prejudice so that a new petitioner could file a petition, supported by all the required documents, for the beneficiary should they wish to do so.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

Accordingly, the petition will be denied for the above stated reasons.

ORDER: The appeal is dismissed.